UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

EASTLAND FOOD PRODUCTS, INC.

and **Case 01–CA–182772**

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 328

Elizabeth Vorro, Esq.,
for the General Counsel.
Thomas McAndrew, Esq.,
for the Respondent
Marc Gursky, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ANDREW S. GOLLIN, Administrative Law Judge. This case was tried before me in Providence, Rhode Island on January 24, 2017, pursuant to a November 30, 2016 complaint and notice of hearing issued by the Regional Director for Region 1 (Boston) of the National Labor Relations Board (the Board).[1] The complaint and notice of hearing alleges Eastland Food Products, Inc. (Respondent or Company) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by refusing to conduct a scheduled plant tour and by refusing to meet and bargain with the United Food and Commercial Workers International Union, Local 328 (Union) over an initial collective-bargaining agreement, so long as Adrian Ventura, a community organizer not employed by Respondent or the Union, remained a member of the Union's bargaining committee. Respondent filed a timely answer denying the substantive allegations and raising a number of affirmative defenses. The facts are largely undisputed.[2]

As explained more fully below, under Board law, when an employer refuses to bargain because it objects to a member of the union's bargaining committee, it bears the heavy burden of establishing the member poses "a clear and present danger" to the collective-bargaining process. Respondent contends Ventura poses such a danger because he, as member of the Union's bargaining committee, would be privy to confidential, proprietary information about

[1] All dates are in 2016, unless otherwise indicated. On December 19, the Regional Director petitioned the United States District Court for the District of Rhode Island for a temporary injunction under Sec. 10(j) of the Act. On January 11, 2017, the District Court issued an order granting the Regional Director's petition. The District Court ordered Respondent to resume bargaining with the Union.

[2] The parties agreed to 24 Joint Exhibits. The Joint Exhibits are identified as "Jt. Exh." The exhibits for the General Counsel are identified as "GC Exh." The briefs are identified as "GC Br." and "R. Br." The hearing transcript is referenced as "Tr." Specific citations to the record are provided to aid review, and are not necessarily exclusive or exhaustive.

Respondent's operations and processes, which if he disseminated would cause Respondent to lose its competitive advantage. Respondent's contention, however, is entirely speculative, because there is no evidence Ventura had any intent or plan to gather or disseminate confidential or proprietary information. Respondent, therefore, has failed to meet its burden for cancelling the scheduled plant tour and for refusing to meet and bargain with the Union, so long as Ventura remained part of the Union's bargaining committee.

All parties were afforded a full opportunity to appear, introduce evidence, examine, and cross-examine witnesses, argue orally on the record, and file posthearing briefs. After carefully considering the entire record, including the demeanor of the witnesses and Respondent's and the General Counsel's posthearing briefs, I find that Respondent violated the Act as alleged in the complaint.[3]

FINDINGS OF FACT

Jurisdiction and Labor Organization Status

Respondent is a Rhode Island corporation with an office and place of business located at 69 Fletcher Avenue, Cranston, Rhode Island (the Cranston facility), where it engages in the operation of a fresh food processing plant. In conducting its operations, Respondent annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Rhode Island. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1). Respondent also admits, and I find, that the Union has been a labor organization the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce, and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

1. Background

At its Cranston facility, Respondent receives, cleans, cuts, and packages ready-to-eat fresh fruit and vegetables, which it then distributes to grocers and retail customers. Respondent started as a family business over 50 years ago. Antonio (Tony) DeMarco III is a member of the founding family, and Respondent's owner and the treasurer. Dayne Wahl is vice president and general manager. Tom Glasgow is plant manager. There are approximately 125 employees at the plant. Most of the employees are Spanish-speaking immigrants, primarily from Central American countries such as Guatemala. Some of the Guatemalan employees speak K'iche as their primary language, but also speak Spanish.[4]

Centro Comunitario de Trabajadores (CCT) is a nonprofit community-based organization serving low wage immigrant workers in the greater New Bedford, Massachusetts area. According to its website, CCT seeks to protect these low wage immigrant workers from unfair and unsafe working conditions. CCT's board and staff are comprised entirely of Central

[3] In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp.*, 335 NLRB 622, 633 (2001), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir. 1997), cert. denied 522 U.S. 948 (1997).

[4] K'iche is a Mayan language that is indigenous to the central highlands of Guatemala.

American immigrants. Its members primarily work for local seafood processing, garment, and recycling companies, many through temporary employment agencies. CCT has worked to "combat flagrant abuses of workers' rights such as wage theft, health and safety violations, discrimination, sexual harassment and retaliation against employees who speak up and organize." (Jt. Exh. 23.) Adrian Ventura is CCT's executive director.[5]

2. Organizing and election

In 2016, a group of Respondent's employees contacted Ventura, a Guatemalan immigrant who speaks both K'iche and Spanish, to discuss workplace issues, including allegations of sexual harassment, safety concerns, and nonpayment of overtime. Ventura met with the employees and attempted to help them.[6] In their discussions, the employees and Ventura talked about organizing a union.

In mid-April, Ventura spoke with Megan Carvalho, the Union's director of organizing.[7] Ventura is not an employee of the Union, but he has helped the Union with other organizing campaigns, including one of a tire recycling company.[8] Following her conversations with Ventura, Carvalho, and her staff launched an organizing campaign, which included holding meetings for Respondent's employees. Ventura attended these meetings, and he also translated what was being said into K'iche.

After the Union filed a representation petition, an election was held on May 19.[9] On May 27, the Regional Director for Region 1 certified the Union as the collective-bargaining representative for the following unit:

> All full-time and regular part-time production, packaging, general preparation, maintenance mechanics, sanitation, drivers, shipping and receiving, and quality assurance employees employed by [Respondent] at its Cranston, Rhode Island facility located at 69 Fletcher Avenue, Cranston Rhode, Island, excluding managerial and professional employees, clerical employees, guards, and supervisors as defined by the Act.

3. Bargaining sessions

Following certification, the parties exchanged correspondence.[10] In June or July, the parties held an informal "meet-and-greet" breakfast at an area restaurant. Present at the meeting were DeMarco, Wahl, Respondent's attorney, Thomas McAndrew, Union President

---

[5] Neither Ventura nor any other representative from CCT was called to testify at the hearing in this case. Aside from pages from the CCT website, there was little evidence introduced regarding this entity.

[6] On April 14, Ventura helped one of the employees, Cesario Ixcund, prepare a letter to Respondent requesting a meeting to discuss these and other issues. The letter was on CCT's letterhead. (GC Exh. 2.) Ventura also participated, along with union officials, at rallies held outside of Respondent's facility.

[7] CCT has no formal affiliation with the Union. According to Carvalho and Melia, CCT is a community organization the Union has worked with as part of its organizing efforts.

[8] Ventura has since begun working with the Union as a "contractor" or "consultant," but he was not paid for any work he performed during the organizing campaign of Respondent or the tire recycling company.

[9] Ventura was present for the ballot count, but he was never introduced or identified to any of Respondent's managers or supervisors.

[10] A number of the Joint Exhibits reflect communication between Respondent and the Union relating to the Union's role as collective-bargaining representative, and Respondent's acknowledgement and compliance with those obligations. (Jt. Exhs. 2–7, 11, and 14).

Timothy Melia, Union Secretary/Treasurer Domenic Pontarelli, and Carvalho. Ventura did not attend, nor did any of the employee members of the Union's bargaining committee. Nothing substantive was discussed at this meeting. The parties never established any ground rules for bargaining at this or any other meeting at issue.

On July 22, the parties met for their first bargaining session at the Federal Mediation and Conciliation Services (FMCS) building in Warwick, Rhode Island. Participating on behalf of Respondent were DeMarco, Wahl, and Attorney McAndrew. Participating for the Union were Melia, Carvalho, Union Attorney Marc Gursky, Elena Hernandez (employee), Cesario Ixcund (employee), and Victor Castro (employee).[11] Adrian Ventura also was present. Up to this point, Ventura was never introduced or identified to Respondent's representatives.[12]

There is some dispute, but it appears that everyone, except for Ventura, Ixcund, and Castro, sat at a large conference room table. Ventura, Ixcund, and Castro sat in chairs on the side near the table. Ventura limited his communications to the employee members of the Union's bargaining committee. He never said anything across the table or to any of Respondent's bargaining committee members. The meeting got off to a late start, so there were no formal introductions. But all of the participants signed in, and the sign-in sheet was copied and given to both sides.

Most of the July 22 meeting was spent with the Union, through Melia, presenting and explaining its noneconomic contract proposals. The parties caucused separately. Respondent did not make any proposals or counterproposals. At the end of the meeting, the parties discussed scheduling further sessions. During this discussion, Melia requested that members of the union bargaining committee be allowed to tour Respondent's facility to familiarize themselves with Respondent's operations to help the Union prepare for bargaining. Wahl agreed to the tour.[13] There was no discussion of confidential or proprietary information, and no discussion of having anyone sign a confidentiality agreement before taking the tour. Both the tour and the bargaining session were scheduled for August 24. The bargaining session was scheduled to take place after the plant tour, back at the FMCS's offices in Warwick.

During the caucuses on July 22, Wahl privately discussed with DeMarco and McAndrew his discomfort with not knowing who the individual sitting next to Ixcund and Castro was, and why he was there. McAndrew told him he would address it with the Union's attorney after the meeting, so as not to embarrass anyone. As planned, at the end of the meeting, Attorney McAndrew asked to speak with Gursky and Melia. They stepped out of the conference room. DeMarco and Wahl were nearby.

DeMarco, Wahl, and Melia each testified about this sidebar conversation. DeMarco recalled McAndrew asked Gursky and Melia who Ventura was and why he was there. DeMarco could not recall what was said in response, other than that Attorney Gursky said he did not know who he was and something like, "Nobody liked the guy." Although DeMarco could not recall what was said, he testified he left with the impression that Ventura would not be present on August 24. (Tr. 158; 181–182.) Wahl recalled that McAndrew asked who Ventura was and

[11] The Union also had a translator (Carlos Gonzalez) there to translate what was being said into Spanish for the employee members of the Union's bargaining committee.

[12] Both DeMarco and Wahl testified that Ventura's face looked familiar from one or more of the rallies held outside of Respondent's facility, but that neither knew who he was.

[13] Wahl initially proposed to have the tour on a Friday, but the employees informed the Union that the plant usually is shutdown or not fully operational on Fridays, so the Union requested, and Wahl agreed, to have the plant tour on a Wednesday, when the facility would be operating.

why was he there, and Mursky said something like, "Nobody likes him." Wahl testified that he too left with the impression that Ventura would not be present on August 24, but he confirmed no one explicitly said that. (Tr. 204; 228–229). Melia recalled that Attorney McAndrew asked who Ventura was and why he was there, and Melia told them Ventura was part of the Union's bargaining committee. In response to leading questions, Melia testified that neither he nor Attorney Gursky agreed that Ventura would not be present on August 24. (Tr. 109–110.)[14]

On August 24, Attorney Mursky, President Melia, and Union Secretary/Treasurer Dominic Pontarelli arrived at Respondent's facility for the scheduled tour. They were given a parking pass, told to park, and then Wahl escorted them to the upstairs conference room, where Attorney McAndrew was already waiting.[15] Carvalho then arrived in her car with employee Elena Hernandez. Wahl gave Carvalho a parking pass and told her to park. She parked her car, and Wahl then escorted Carvalho and Hernandez to the upstairs conference room to wait with the others. Victor Castro later arrived in the conference room.

At some point, before the tour was set to begin, Wahl saw Ventura walking through the Company's parking lot toward the building. He went back into the conference room very upset. He said to Melia and Mursky that he thought they had agreed that Ventura was not going to be coming. Wahl stated he was not going to allow Ventura into the building, and he made reference to Respondent's confidential or proprietary information. But he did not provide any specifics as to what he was referring to when he made this reference.[16]

The Union bargaining committee then met outside of the conference room. The employee members of the committee stated they wanted to have Ventura there, and one of the employees was prepared to call a "strike" if Ventura was not allowed to participate. The Union committee then went back into the conference room and told Respondent's representatives that Ventura was part of their bargaining committee, and they wanted him there. McAndrew made it clear that Respondent was not going to meet or bargain so long as Ventura was present.[17] The

[14] I credit the testimony of Melia over DeMarco and Wahl about the contents of this conversation. Melia had a clearer recollection of what was actually said versus the impressions people may have left with following the exchange. Additionally, DeMarco and Wahl were a few steps away from the others while the conversation took place. As such, I credit Melia that the Union never agreed Ventura would not be present for the tour or for bargaining on August 24.

[15] There was no evidence presented regarding the security at Respondent's plant. The only information is that visitors who drive there obtain a pass in order to park in Respondent's parking lot and that delivery drivers are not allowed inside the plant.

[16] Respondent did not articulate what specific information Ventura would have access to that is confidential or proprietary. During his testimony, Wahl generally referred to the proprietary nature of the facility layout, custom-made equipment, and specialized processes—all of which he considered proprietary and what made Respondent unique. When DeMarco was asked whether anyone is required to sign a confidentiality agreement prior to working at the facility, he said only Wahl. When DeMarco was asked why the employees were not asked to sign such agreements, he said that they were minimum wage employees and they have limited jobs, and he did not think such agreements would be enforceable against these hourly employees. He added that these hourly employees do not have access to the information that he, Wahl and the other upper managers have. When pressed, DeMarco confirmed that if Ventura were allowed access he would see what these hourly employees see. (Tr. 173-174.)

[17] Wahl testified he has no knowledge that Ventura or CCT have ever disclosed information about companies they have dealt with, and there is no specific situation to which he was referring to justify his concerns. He said his unfamiliarity with CCT was what concerned him. (Tr. 240–241). Wahl also stated he was concerned with Ventura being involved in bargaining because he was "friends" with the workers. (Tr. 209, 236.) But he did not provide any further explanation.

Union representatives then left the plant, and the Union later filed the present charge. There was no further bargaining prior to the hearing.

ANALYSIS

1. Allegations and Legal Authority

Paragraphs 13 and 14 of the complaint and notice of hearing allege that since about August 24, Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to conduct the scheduled tour and by refusing to meet and bargain with the Union, so long as Adrian Ventura was on the Union's bargaining committee. The General Counsel argues that Respondent had an obligation to allow access and to meet and bargain with the employees' chosen bargaining representatives. Respondent does not dispute that it cancelled the tour and the bargaining session solely because of Ventura's presence, but contends that it was justified in doing so because Ventura posed "a clear and present danger" to the bargaining process. Specifically, Respondent argues that Ventura, a third-party representative of CCT, an unrelated labor organization, has an ulterior motive for participating, which is to "engage in a fishing expedition designed to educate [him] as to the 'ins and outs' of [Respondent's] sector of the food preparation industry . . ., with no particularized interest in the work or conditions of employment of [Respondent's] employees." (R. Br. 19–20.)

The U.S. Supreme Court recognized that Section 7 the Act affords employees the "fundamental right" to select representatives of their own choosing for the purposes of collective bargaining.[18] *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). In general, parties have a right to choose whomever they wish to represent them in bargaining, and neither party can control the other party's selection of representatives.[19] See generally *Wellington Industries,* 357 NLRB 1625 (2011); *Palm Court Nursing Home*, 341 NLRB 813, 819 (2004); *General Electric Co.*, 173 NLRB 253, 255 (1968), enfd. *General Electric v. NLRB*, 412 F.2d 512, 516–517 (2d Cir. 1969); *Minnesota Mining & Mfg. Co. v. NLRB*, 415 F.2d 174, 177–178 (8th Cir. 1969).

There are a few recognized exceptions to this general rule, but they are rare and confined to situations so infected with ill-will, usually personal, or conflicts of interest, as to make good-faith bargaining impractical. See *General Electric Co. v. NLRB*, 412 F.2d at 517. See also *Pony Express Courier Corp.*, 297 NLRB 171 (1989) (union agent sought to be included operated a side business that competed with employer); *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954) (union established company in direct competition with employer);*Sahara Datsun*, 278 NLRB 1044 (1986)(employer not obligated to bargain with representative who falsely accused owner of drug dealing and prostitution); *Fitzsimons Mfg. Co.*, 251 NLRB 375, 379–380 (1980), affd. per curiam *United Auto Workers v. NLRB*, 670 F.2d 663 (6th Cir. 1982) (no obligation to bargain with union representative who physically assaulted employer's personnel

[18] Sec. 7 of the Act grants employees the right "to bargain collectively through representatives of their own choosing." Sec. 8(a)(1) makes it an unfair labor practice "to interfere with . . . the exercise of the rights guaranteed" in Sec. 7, and Sec. 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."

[19] There is no dispute that the Union requested the plant tour to prepare for bargaining, and Respondent agreed to conduct the tour. Respondent does not dispute that the Union had a legitimate reason for the tour, and that it agreed to give the tour. Respondent's sole issue was with Ventura's participation. As a result, both allegations hinge on whether Respondent has met its burden to lawfully exclude Ventura from participating as a member of the Union's bargaining committee.

director during grievance meeting); *NLRB v. ILGWU*, 274 F.2d 376, 379 (3d Cir. 1960) (ex-union official added to employer committee to "put one over on the union"); *NLRB v. Kentucky Utilities Co.*, 182 F.2d 810 (6th Cir. 1950) (union negotiator expressed great personal animosity towards employer). *Cf. Long Island Jewish Medical Center*, 296 NLRB 51, 71–72 (1989)(employer unlawfully refused union representative who had lightly pushed manager, used obscenities toward manager, and blocked manager's way).

The party seeking to exclude a selected representative from bargaining has a heavy burden of proving the individual poses a "clear and present danger" to the collective-bargaining process. See *General Electric v. NLRB*, 412 F.2d at 519–520; *Milwhite Co., Inc.*, 290 NLRB 1150 (1998). To meet this burden, there must be evidence of exceptional circumstances; mere speculation is not sufficient. Id. The Board has held the inclusion of individuals who do not work in the unit, who do not work for the employer, and/or who do not work for the union, is, without more, insufficient to constitute exceptional circumstances. See *Indiana & Michigan Electric*, 599 F.2d 185 (1979) (fg. *Co. v. NLRB*, 415 F.2d at 177–178) (union permitted to have participants from other locals); *General Electric Co. v. NLRB*, 412 F.2d at 517–520 (union permitted to have participants from other international unions); *Standard Oil Co. v. NLRB*, 322 F.2d 40, 44 (6th Cir. 1963) (other locals). See also *Vibra-Screw, Inc.*, 301 NLRB 371 (1991)(union permitted to have discharged employees on bargaining committee); *Colfor, Inc.*, 282 NLRB 1173 (1987) (same). Additionally, the Board has held that possible exposure to confidential information, which if disclosed would be detrimental to the employer, is, without more, too speculative to constitute exceptional circumstances. See *Milwhite Co., Inc.*, 290 NLRB at 1152; *Minnesota Mining and Manufacturing Co.*, 173 NLRB 275, 278 (1968).[20]

In *CBS, Inc.*, 226 NLRB 537, 539 (1976), enforced sub nom. *IBEW v. NLRB*, 557 F.2d 995 (2d Cir. 1977), the Board found non-employee bargaining committee member had a disqualifying conflict of interest because he would have access to confidential, proprietary information. In that case, CBS was negotiating with the IBEW over a contract covering its television technicians. At the time, CBS had a monopoly on microwave camera technology, which allowed it to conduct live remote broadcasts. This technology gave CBS a significant advantage over its competitors, NBC and ABC. CBS intended to disclose certain confidential information about this technology during bargaining with the IBEW in an effort to negotiate certain modifications to the existing agreement. After bargaining began, the IBEW added a representative from the National Association of Broadcast Engineers and Technicians, AFL–CIO ("NABET") to its bargaining committee. NABET did not represent any CBS employees, but did represent employees at NBC and ABC. CBS refused to bargain with the NABET representative present, arguing a conflict of interest in light of CBS' intent to disclose confidential information about its proprietary camera technology, which, if NABET shared with NBC and ABC, would cause CBS to lose its competitive advantage.

[20] Respondent argues in its posthearing brief that Ventura "was not necessary to the collective-bargaining process as an expert, consultant, translator, or other third-party participate." (R. Br. 22–24). However, a union is not obligated to prove to an employer how or why its bargaining committee members will assist or contribute to the bargaining process. While the Board has articulated circumstances in which an individual may be disqualified from participating in bargaining, it has not established any prerequisites. The Act merely requires that the employer bargain with its employees' chosen bargaining representatives. The evidence indicates the three employee members of the Union's bargaining committee believed that Ventura offered something, and that it was important to have him present, because they insisted he be allowed to remain for the tour and for bargaining, and at least one was willing to call a strike if he was not.

The Board adopted the administrative law judge's finding that the NABET representative posed a "clear and present danger" to the bargaining process. Id. at 539. In reaching its conclusion, the Board distinguished *General Electric v. NLRB*, supra, which involved the inclusion of representatives from other unions that represented the employer's employees in other units. The Board noted that, unlike in *General Electric*, NABET had no connection to CBS or its employees; the only connection was that NABET represented "employees of its two archrivals." Id. The Board held that, in this "unique" case, it was a disqualifying conflict of interest to have a committee member who represents employees of direct competitors, particularly where bargaining will involve confidential, proprietary information that, if shared with those competitors, would cause the employer to lose its competitive advantage.[21] Id.

2. Application of Legal Authority

Relying on *CBS, Inc.*, Respondent argues Ventura poses a clear and present danger to the bargaining process because of a similar conflict of interest.[22] Respondent contends Ventura is not employed by Respondent or the Union, and he and CCT could represent employees at other food processing companies. And, as a member of the Union's bargaining committee, Ventura would have access to confidential, proprietary information about Respondent's operations, which, if shared with others, could cause Respondent to lose its competitive advantage.

CBS, Inc. is distinguishable for several reasons. To begin with, while the NABET representative had no relationship with the employer, the union, or the employees, Ventura does. The employees came to him first with their concerns and interest in organizing; he introduced them to the Union; he assisted the Union in communicating with the employees who primarily spoke K'iche; he attended organizing meetings; he attended the vote count; and, most importantly, he is who the employees wanted present for the August 24 tour and bargaining session, as evidenced by their willingness to strike if he was not allowed to attend. Additionally, while Ventura did not work for the Union, he had helped the Union in organizing and representing other employees, including those working at a tire recycling center.

Second, unlike *CBS, Inc.*, there is no evidence CCT or Ventura has a relationship with any of Respondent's competitors.[23] Respondent argues Ventura and CCT *may*, in the future,

[21] In *CBS, Inc.*, the administrative law judge discussed whether having a confidentiality agreement would adequately address the employer's concerns. The judge concluded such a pledge would be inadequate because the NABET representative had "a primary allegiance" to the ABC and NBC employees he represented, and he would have been obligated to disclose to those employees any information he obtained during the CBS negotiations, thereby violating any pledge of confidentiality to CBS. 226 NLRB at 538 fn. 2 and 539. In adopting the judge's conclusions, the Board explicitly stated it was not adopting 'the judge's comments with respect to NABET's duty to disclose information it might receive on a confidential basis [during the CBS negotiations.]" Id. at 537 fn. 1.

[22] Respondent argues in its brief that it has no obligation to allow access to or bargain with Ventura because neither he nor CCT represents Respondent's employees, although CCT could represent the employees because its website indicates that it qualifies as a "labor organization" within the meaning of Sec. 2(5) of the Act. (R. Br. 20–22.) Whether CCT is a statutory labor organization or not is irrelevant to deciding this case. CCT has made no claim that it represents Respondent's employees and has made no demand to bargain. Ventura's presence and involvement is as a selected member of the Union's bargaining committee, not as a representative of CCT.

[23] The closest CCT comes to having such a relationship is that it works with employees at seafood processing companies. (Jt. Exh. 23.) DeMarco testified he had heard the Union possibly was attempting

seek to represent employees at other food processing companies, including Respondent's competitors. Specifically, in its posthearing brief, Respondent claims that "Centro Communitario de Trabajadores' true motives remained hidden but they are not difficult to discern. It is a labor organization as defined by the Act. It intends to expand the scope of its activities into Rhode Island, and to use Eastland as thin end of that expansion wedge." (R. Br. 17.) But Respondent's witnesses acknowledged this is entirely speculative. Respondent presented no evidence that CCT or Ventura had any intent or plan to begin working with employees at any of Respondent's competitors. Regardless, the Board has held that employers cannot refuse to bargain merely because their collective-bargaining representative's negotiating team may include individuals that maintain relations with the employer's competitors. See *A.M.F. Incorporated-Union Machinery Division*, 219 NLRB 903, 904, 907 (1975); *Harley-Davidson Motor Co.,*, 214 NLRB 433, 437 (1974); *Roscoe Skipper, Inc.*, 106 NLRB 1238, 1240–1242 (1953).

Third, Respondent contends Ventura would, as part of the Union's bargaining committee, have access to confidential or proprietary information, which, if disclosed, would cause Respondent to lose its competitive advantage. Respondent has the burden of identifying what it considers confidential or proprietary information, and proving that its legitimate and substantial confidentiality interest outweighs the Union's need for access or information. See *Detroit Edison v. NLRB*, 440 U.S. 301 (1979). See also *Holyoke Water Power Co.*, 273 NLRB 1369, 1370 (1985) (relating to access). A blanket claim of confidentiality will not satisfy the burden of proof. *The Earthgrains Co.*, 349 NLRB 389 (2007).

Respondent has asserted that its facility layout, custom-made equipment, and processes are trade secrets, proprietary, and/or confidential. Yet, it did not present evidence as how or why this is so. Nor did Respondent present evidence as to the steps it has taken to protect that information. Respondent was asked whether it has employees sign confidentiality agreements, and DeMarco testified that only Wahl has such an agreement. When DeMarco was asked why none of the hourly employees are asked to sign such agreements, he responded that they are just hourly employees and are usually limited to only parts of the operations. When pressed on this, DeMarco confirmed that during a tour, Ventura would see the same information that these hourly employees saw. There is no evidence that Ventura had any additional skills or experience that would allow him to gather or discern information differently than the hourly employees who work at Respondent's facility.

Regardless of whether Respondent has met this burden of proving confidentiality, it acknowledges that it has no basis on which to assert that Ventura would disclose the information at issue. Wahl testified he had no knowledge that Ventura or CCT had previously disclosed confidential or proprietary information from any of the other companies they dealt with, and his concerns were based entirely on his unfamiliarity with Ventura and CCT. The Board has held that mere speculation of possible abuse of information that is shared is not enough. See *General Electric Co.*, 173 NLRB at 255 (the Board majority rejected that "the mere possibility of such abuse, without substantial evidence of ulterior motive or bad faith, justifies qualification of a union's right to select the persons who will represent it at the negotiating table."); *Minnesota Mining & Mfg. Co.*, 173 NLRB at 278 (The Board held that the "mere possibility of future abuse (which indeed the Union disclaims), is no justification for an anticipatory refusal to bargain."). See also *Caterpillar, Inc.*, 361 NLRB No. 77 (2014)(Board majority held employer failed to articulate specific confidentiality concerns posed by allowing

to organize other area food industry employers (Greencore and Snipped Fresh), but neither he nor Wahl were aware if Ventura or CCT was attempting to organize these companies. (Tr. 190–191.)

union access for health and safety investigation, negating need to apply *Holyoke Water Power Co.* balancing test).

Moreover, Respondent cannot simply deny the Union access or refuse to bargain when confidential or proprietary information is involved. The Board has held that when the employer has legitimate and substantial confidentiality interests, it must bargain with the union about possible safeguards, such as a confidentiality agreement, and/or establish why those safeguards are inadequate to protect the information at issue from dissemination. See generally *Exxon Co. USA*, 321 NLRB 896, 898 (1996); *Pennsylvania Power Co.*, 301 NLRB 1104, 1105–1106 (1991). Respondent never raised or bargained over safeguards to address its concerns. In its post-hearing brief, Respondent argues that requiring Ventura or CCT to sign a confidentiality agreement would be futile because it would not be enforceable. Respondent, however, cites no legal authority to support this argument. Instead, it argues that Ventura and CCT are located 35 miles away, and Respondent would not know if he disclosed information in violation of such an agreement.

Finally, Respondent does not dispute it would have conducted the tour and bargained with the rest of the union bargaining committee, so long as Ventura was not involved. The Union's bargaining committee included the union president, the Union's director of organizing, the Union's attorney, and possibly a union translator. Yet, Respondent raised no issues or concerns about any of these individuals having access to its confidential, proprietary information. Respondent failed to explain why it believed they did not pose a risk, but Ventura did. The closest Wahl came to distinguishing Ventura from these union representatives was that Ventura did not work for the Union, and he was "friends" with the workers. Wahl never explicated how this was significant, or how it justified excluding him.

Based on the foregoing, I find Respondent has failed to prove Ventura posed a "clear and present danger" to bargaining to justify cancelling the tour and bargaining on August 24, so long as he remained part of the Union's bargaining committee. Without evidence of exceptional circumstances indicating bad faith on the part of the Union, Respondent was obligated to conduct the tour and to bargain with the Union's bargaining committee, including Ventura. *General Electric*, 412 F.2d at 520. Under these circumstances, I find that Respondent refused to bargain in good faith, in violation of Section 8(a)(5) and (1) of the Act. See id. See also *Standard Oil Co. v. NLRB*, 322 F.2d at 44 (employer unlawfully refused to negotiate with union bargaining committee, which added temporary representatives from affiliated bargaining units in order to improve communication between them); *NLRB v. Indiana & Michigan Electric Co*., supra, (employer unlawfully refused to bargain with union negotiating committee because the union was coordinating the various bargaining efforts).[24]

[24] In its answer, Respondent raised a number of affirmative defenses, which it has the burden of proving. To begin with, Respondent contends the complaint is barred by Sec. 10(b) of the Act. The charge was filed and served on or around August 24, the same day that Respondent refused access and to bargain so long as Ventura remained a part of the bargaining committee. Thus, the defense fails. Respondent also alleges the complaint fails to state a claim upon which relief may be granted, and that Respondent's employment practices are lawful and in good faith under the Act. As stated above, I find the General Counsel has met its burden of establishing the alleged violations in this case. Respondent also contends the Union's claims are barred, in whole or in part, by estoppel or waiver. Specifically, Respondent contends the claims are barred, in whole or in part, based upon the parties' agreement on July 22 that Ventura would not be present on August 24. As stated above, I credit Melia's testimony that there was no agreement that Ventura would not be present on August 24. And, as stated above, Respondent failed to meet its burden of establishing that Ventura posed a clear and present danger. As a result, I find Respondent has failed to meet its burden regarding any of its affirmative defenses.

CONCLUSIONS OF LAW

1. Eastland Food Products, Inc. (Respondent) is an employer engaged in commerce at its facility located at 69 Fletcher Avenue, Cranston, Rhode Island (the facility) within the meaning of Section 2(2) of the Act.

2. The United Food and Commercial Workers International Union, Local 328 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is certified as the collective-bargaining representative of the following appropriate unit:

> All full-time and regular part-time production, packaging, general preparation, maintenance mechanics, sanitation, drivers, shipping and receiving, and quality assurance employees employed by Respondent at its Cranston, Rhode Island facility located at 69 Fletcher Avenue, Cranston Rhode, Island, excluding managerial and professional employees, clerical employees, guards, and supervisors as defined by the Act.

4. Eastland Food Products, Inc. violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with its employees' exclusive collective-bargaining representative since August 24, 2016, when it cancelled the scheduled tour of the facility so long as Adrian Ventura remained a member of the Union's bargaining committee.

5. Eastland Food Products, Inc. violated Section 8(a)(5) and (1) of the Act by failing and refusing to meet and bargain in good faith with its employees' exclusive collective-bargaining representative since August 24, 2016, so long as Adrian Ventura remained a member of the bargaining committee.

6. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent is ordered to cease and desist from failing or refusing to conduct a tour of its facility if Adrian Ventura remains part of the Union's bargaining committee. Respondent is ordered to cease and desist from failing or refusing to meet and bargain with the Union if Adrian Ventura remains part of the Union's bargaining committee. Respondent is ordered to cease and desist from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. Respondent shall, upon request, provide the Union's bargaining committee (including Ventura) a tour of the facility and, upon request, bargain with the Union and its bargaining committee (including Ventura) as the exclusive collective-bargaining representative of the employees in above-described unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

The General Counsel requests remedies in addition to those the Board generally grants for the above violations. The Board has broad discretion to fashion a just remedy to fit the circumstances of each case it confronts. *Maramont Corp.*, 317 NLRB 1035, 1037 (1995). The

Supreme Court has interpreted Section 10(c) as vesting the Board with discretion to devise remedies that effectuate the policies of the Act. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-899 (1984).

The complaint also requests an extended bargaining order under *Mar-Jac Poultry*, 136 NLRB 785 (1962). After the Board certifies a union as the employees' representative, Section 9(c)(3) of the Act provides that that the union's presumption of majority status cannot be challenged by a new election for a period of 12 months. "The Board has long held that where there is a finding that an employer, after a union's certification, has failed or refused to bargain in good faith with that union, the Board's remedy therefore ensures that the union has at least 1 year of good-faith bargaining during which its majority status cannot be questioned." *Mar-Jac Poultry*, supra. An employer's refusal to bargain with a newly certified union deprives the union of the opportunity to bargain during the time of its greatest strength. *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), enfd. 156 Fed.Appx. 331 (D.C. Cir. 2005). The appropriate length of the extension must be determined by considering "the nature of the violations, the number, extent, and dates of the collective-bargaining sessions, the impact of the unfair labor practices on the bargaining process, and the conduct of the union during negotiations." *Northwest Graphics, Inc.*, 342 NLRB at 1289.

In this case, I find that the record provides adequate basis to conclude that an extension of the certification year is warranted based on the Respondent's unfair labor practices. Respondent does not deny it has refused since August 24, 2016 to conduct the tour and to meet and bargain with the Union, so long as Adrian Ventura remains part of the bargaining committee. The parties, therefore, have not met for six months. There are no other alleged unfair labor practices. Under the circumstances, I believe that extending the certification year for six months is appropriate.

The complaint requests that the notice to employees be read to its employees at a mandatory meeting, by or in the presence of the managers, during working hours. I decline to grant this enhanced remedy. The violations at issue are not "so numerous, pervasive, and outrageous" such that this particular additional remedy is required "to dissipate fully the coercive effects of the unfair labor practices found." *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995). See also *Federated Logistics*, 340 NLRB 255, 258 (2003).

However, Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act. As the Respondent has a large number of employees whose primary language is Spanish, the Respondent shall be required to post the paper notice in both English and Spanish. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Eastland Food Products, Inc., Cranston, Rhode Island, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to meet and bargain with the United Food and Commercial Workers Union, Local 328 (Union), as the exclusive bargaining representative of the employees in the bargaining unit described in paragraph 2(a) below, so long as Adrian Ventura remained on the Union's bargaining committee.

(b) Failing or refusing to allow Adrian Ventura and other designated bargaining committee members of the Union access to tour Respondent's Cranston, Rhode Island facility.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request by the Union, meet and bargain with the Union and its bargaining representatives, including Adrian Ventura, as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and permit access to the Union's bargaining representatives, including Adrian Ventura, to tour Respondent's Cranston, Rhode Island facility; and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production, packaging, general preparation, maintenance mechanics, sanitation, drivers, shipping and receiving, and quality assurance employees employed by Respondent at its Cranston, Rhode Island facility located at 69 Fletcher Avenue, Cranston Rhode, Island, excluding managerial and professional employees, clerical employees, guards, and supervisors as defined by the Act.

(b) Upon request by the Union, conduct a plant tour with the Union and its bargaining representatives, including Adrian Ventura.

(c) Within 14 days after service by the Region, post at its facility in Cranston, Rhode Island, copies of the attached notice marked "Appendix"[26] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 24, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 1, 2017

Andrew S. Gollin
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to meet and bargain with the United Food and Commercial Workers Union, Local 328 (the Union), in the following appropriate unit, because the Union's chosen bargaining committee includes Adrian Ventura. The appropriate bargaining unit is:

> All full-time and regular part-time production, packaging, general preparation, maintenance mechanics, sanitation, drivers, shipping and receiving, and quality assurance employees employed by Respondent at its Cranston, Rhode Island facility located at 69 Fletcher Avenue, Cranston Rhode, Island, excluding managerial and professional employees, clerical employees, guards, and supervisors as defined by the Act.

WE WILL NOT fail or refuse to provide the Union's chosen bargaining committee with a tour of our Cranston, Rhode Island facility, because the bargaining committee includes Adrian Ventura.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union's chosen bargaining committee as the exclusive representative of the employees in the above appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, on request, provide the Union's chosen bargaining committee with a tour of our Cranston, Rhode Island facility.

EASTLAND FOOD PRODUCTS, INC
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine

whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, 6th Floor, Boston, MA 02222–1072
(617) 565-6700, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-182772 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (617) 565-6700.